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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

GARY MORRIS PRIDE,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the admission of twenty (20) extrinsic offenses constitutes a violation of Petitioner's Constitutional rights to a grand jury indictment and to due process of law where the jury was permitted to determine that the Petitioner committed the unindicted offenses on a standard of proof short of "beyond a reasonable doubt."

2. Whether the District Court's failure to conduct an evidentiary hearing on jury misconduct is a violation of Petitioner's Constitutional rights to remain silent and to due process of law where the misconduct consisted of the jury discussing Petitioner's failure to testify and deciding that the reason he failed to testify was because he probably had a prior criminal record.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

CITATION TO OPINION BELOW 2

JURISDICTION 2

CONSTITUTIONAL PROVISIONS, RULES AND STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING CERTIORARI . . . 6

CONCLUSION 8

CERTIFICATE OF SERVICE 9

APPENDIX A A-1

APPENDIX B B-1

APPENDIX C C-1

TABLE OF AUTHORITIES

CASES

McDONALD V. PLESS,
238 U.S. 264 (1915) 11

IN RE WINSHIP
397 U.S. 358 (1970) 8

CONSTITUTIONAL PROVISION, STATUTES AND RULES

Fifth Amendment of the United States Constitution 10

Title 18, United States Code, Section 2 3

Title 21, United States Code, Section 841(a)(1) 3

Title 28, United States Code, Section 1254(1) 2, 4

Federal Rules of Evidence 104(b) 3, 5, 6

Federal Rules of Evidence 404(b) 3, 6

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The Petitioner, GARY MORRIS PRIDE, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on April 22, 1983.

CITATION TO OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit in this case is cited as United States v. Pride, is unreported, and appears herein as Appendix A.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on April 22, 1983, and this Petition for Writ of Certiorari was filed within sixty days of that date in accordance with Rule 20.1 of the Rules of the Supreme Court of the United States. The Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

As provided by Supreme Court Rule 21.1(f), the verbatim quotation of the following provisions of the Constitution,

relevant Statutes and Rules are set forth as Appendix B herein: the Fifth Amendment of the Constitution of the United States, Rule 104(b) of the Federal Rules of Evidence and Rule 404(b) of the Federal Rules of Evidence.

STATEMENT OF THE CASE

The Petitioner and one other individual were indicted by a Grand Jury in the Northern District of Texas on May 11, 1982. Petitioner was charged with aiding and abetting the distribution of approximately eight (8) ounces of cocaine, in violation of 21 U.S.C. §841(a)(1) and 18 U.S.C. §2. After entry of a not guilty plea at arraignment, the District Court held a pre-trial hearing on June 21, 1982. The jury trial began on June 28, 1982 and resulted in a verdict of guilty on June 30, 1982.

On July 7, 1982, the Petitioner filed a motion for a new trial alleging jury misconduct. This motion was denied without a hearing on July 20, 1982. Notice of Appeal of the Judgment was filed by Petitioner on July 23, 1982. The per curiam opinion of the Fifth Circuit Court of Appeals was entered on April 22, 1983. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

On appeal the Petitioner contended that the admission of twenty offenses not alleged in the indictment constituted a denial of due process since the jury was allowed to find that the Petitioner committed the extrinsic criminal offenses without proof beyond a reasonable doubt. In addition, the Petitioner argued that the trial court committed reversible error in denying Petitioner's Motion for

a New Trial because of jury misconduct without conducting a hearing thereon. An affidavit submitted in support of this motion showed that the jury disregarded the Court's instruction to draw no inference from the Defendant's election not to testify and inferred that this failure to take the stand was because he probably had a prior criminal record.

The Fifth Circuit Court of Appeals, rejected the first of Petitioner's argument and held that their review of the District Court's action in admitting the extrinsic offenses was limited only to a review for abuse of discretion. The panel further ruled that the standard of proof required for the admission of extrinsic offenses is governed by Rule 104(b) of the Federal Rules of Evidence and specifically held that extrinsic offenses do not

have to be proven beyond a reasonable doubt.

With regard to the jury misconduct issue, the Court classified the jury's discussion of the defendant's failure to testify and the fact that this was probably due to the fact that he had a prior criminal record as "inferences the jury may draw" and concluded that the case was within the rule that a juror would not be heard to impeach his own verdict.

REASONS FOR GRANTING CERTIORARI

I. Rules 104(b) and 404(b) are an unconstitutional violation of Petitioner's Fifth Amendment rights to due process and to a grand jury indictment inasmuch as it allows the jury to find that the Petitioner committed unindicted offenses upon a standard of proof which is less

than beyond a reasonable doubt.

The only evidence of extrinsic offenses in this case came from the co-defendant Scott Grady Craft. Craft struck a plea bargain with the Government which resulted in him entering a plea on the first day of trial to a misdemeanor charge in exchange for his testimony against Petitioner. Craft testified that he had purchased cocaine from Petitioner on earlier occasions, but could not provide any details of these transactions. In a hearing outside the presence of the jury, the District Court overruled Petitioner's objection and ruled that this evidence was clear and convincing and ordered it admitted to show "ongoing transactions between the parties." The disputed testimony is contained herein as Appendix C.

As this Court has observed "a person accused of a crime...would be at a severe disadvantage, a disadvantage amounting to a lack of fundamental fairness, if he could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case." In re Winship, 397 U.S. 358, 363 (1970). The Supreme Court has never considered the standard of proof required of extrinsic offenses, even though they are widely and frequently used in the federal court system.

Petitioner's case clearly demonstrates the potential for great injustice and prejudice in allowing the admission of unindicted offenses without requiring proof beyond a reasonable doubt. A review of Craft's testimony reveals the incredible vagueness it had. It is fair to say that

there is not enough detail in Craft's testimony for the prosecution to be able to draft and obtain an indictment covering these extrinsic offenses. Craft's testimony clearly does not meet the standard of beyond a reasonable doubt.

The difficulty in defending against this kind of evidence is obvious. Because of the lack of detail regarding times, places, etc., it is impossible to present testimony from potential alibi or other defensive witnesses. Thus, Petitioner must be engaged in the rankest sort of shadow boxing to attempt to defend himself.

II. The Fifth Circuit opinion which permits a jury to conclude that Petitioner's election not to testify was because he probably had a prior criminal

record completely emasculates his right to due process and his right to remain silent and not testify against himself.

One of the fundamental guarantees of the Fifth Amendment is that no person shall be required to testify against himself in a criminal prosecution. Obviously, if a jury is allowed to disregard the court's instruction to draw no inference from the Petitioner's failure to testify and not only discuss this failure, but conclude that it is because Petitioner probably had a prior criminal record, his right to remain silent is a meaningless one. It should be noted that there was absolutely no evidence at trial from which the jury could infer that the Petitioner probably had a prior criminal record. In other words, the jury's inference regarding this stems solely from

Petitioner's failure to testify.

The Supreme Court last considered the issue of jury misconduct in McDonald v. Pless, 238 U.S. 264 (1915). In that opinion the Court recognized that "it would not be safe to lay down any inflexible rule because there might be instances in which such testimony of the juror could not be excluded without 'violating the plainest principles of justice.'" Pless at 266. It is respectfully submitted that Petitioner's case falls squarely within the violation contemplated by the Court in that case.

CONCLUSION

For these reasons above, a Writ of Certiorari should be issued to review the judgment in the opinion of the Fifth Circuit.

Respectfully submitted,

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ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Petition for Writ of Certiorari was mailed to Mr. Jack Williamson, Assistant United States Attorney, 1100 Commerce Street, Room 16G28, Dallas, Texas 75242 and to Mr. Wade Hampton McCree, Jr., Solicitor-General, Department of Justice, Suite 5143, Ninth and Constitution Avenue, N.W., Washington, D.C. 20503, on this the 31st day of May, 1983.

Dan C. Guthrie, Jr.

DAN C. GUTHRIE, JR.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-1393
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GARY MORRIS PRIDE,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

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(April 22, 1983)

Before REAVLEY, GARWOOD and JOLLY, Circuit Judges.

PER CURIAM:

This is an appeal from a jury trial in which appellant Pride was convicted for aiding and abetting the distribution of cocaine. 21 U.S.C. § 841(a); 18 U.S.C. § 2. Finding no error in the proceeding below, we affirm.

Pride was convicted for the sale of eight ounces of cocaine. On May 7, 1982,

Scott Craft, originally Pride's co-defendant, met in a Dallas motel room with an informant and an undercover DEA agent. Craft agreed to obtain and deliver a pound of cocaine from his supplier for $35,000. Craft was to deliver the cocaine in two trips. Craft, after a brief detour in a school parking lot, drove to a Seven-Eleven parking lot where he met appellant Pride. Upon Craft's return with the cocaine he was arrested. Craft gave a description of his supplier and his supplier's car. Pride called the hotel room soon after, and a few minutes later a car matching Craft's description entered the motel's parking lot. DEA agents tried to stop the car, and succeeded in doing so only after a short chase. Pride turned out to be the driver of that car. Craft subsequently agreed to become a prosecution witness, and identified Pride as his supplier.

On this appeal, Pride advances three arguments for reversal. First, that allowing Craft to testify regarding prior drug sales between Pride and Craft was inadmissible character evidence. Second, that there was insufficient evidence for conviction. Third, that the district court should have granted the motion for new trial based on evidence of juror misconduct. We treat each of these issues below.

A. Evidence of Other Crimes: Rule 404(b)

Appellant argues that the government impermissibly introduced evidence of other crimes to show that he acted in conformity therewith. The trial court

admitted the evidence under Fed. R. Evid. 404(b).

The disputed testimony came from Craft. Craft testified that he had purchased cocaine from the accused over 20 times, and that the accused was his only source of cocaine. Craft did not, however, remember many of the details of these transactions, and stated that the last time he had purchased from Pride was some time during the previous summer. The district court admitted Craft's testimony, stating that he found it clear and convincing.

We first note that our review of the district court's action is limited. We may reverse only for an abuse of discretion. United States v. Guerrero, 650 F.2d 728 (5th Cir. 1981). We find no abuse of discretion here.

Rule 404(b) provides that:

> [e]vidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identify or absence of mistake or accident.

United States v. Beechum, 582 F.2d 898 (5th Cir. 1978), cert. denied, 440 U.S. 920 (1979) sets out the method for apply-

ing this rule in this circuit. Beechum establishes three different prerequisites to admissibility.

First, the government must show that the defendant in fact committed the extrinsic act. Id. at 913. This question is determined by Rule 104(b), under relevancy of a preliminary fact, and "the preliminary fact can be decided against the proponent only where the jury could not reasonably find the preliminary fact to exist." Id. quoting 21 Wright & Graham, Federal Practice and Procedure: Evidence § 5054 at 269 (1977).[1] Here a jury could reasonably find that the other

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[1] Appellant argues that this violates due process and that the government should be required to prove the extrinsic acts beyond a reasonable doubt. This argument was rejected in Beechum, in which the court analogized the admissibility of extrinsic acts to findings at suppression hearings. The court stated:

> It is not true that every fact or issue in a criminal case need be proved beyond a reasonable doubt . . . For instance, findings at suppression hearings are made by a preponderance of the evidence. United States v. Matlock, 415 U.S. 164, 177 n.14, 94 S.Ct. 988, 996, 39 L.Ed.2d 242 (1974); Lego v. Twomey, 404 U.S. 477, 92 S.Ct. 619, 30 L.Ed.2d 618 (1972). Of course, each of the essential elements of the offense for which the

acts were committed. Craft's testimony, while not specific, was unequivocal and the district court found it clear and convincing. The fact that Craft's testimony is the sole evidence of these other acts is not dispositive. United States v. Trevino, 565 F.2d 1317, 1319 (5th Cir.), cert. denied, 435 U.S. 971 (1978). United States v. Darland, 659 F.2d 70, 72 (5th Cir. 1981), cert. denied, 454 U.S. 1157, (1982).

After meeting this initial hurdle, two more requirements must be met to admit the extrinsic evidence.

> First, it must be determined that the extrinsic offense evidence is relevant to an issue other than the defendant's character. Second, the evidence must possess probative value that is not substantially outweighed by its

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defendant is being tried must be proved beyond a reasonable doubt. In re Winship, 397 U.S. 358, 361-63, 90 S.Ct. 1068, 1071-72, 25 L.Ed.2d 368 (1970). Winship, however, "was not concerned with standards for determining the admissibility of evidence or with the prosecution's burden of proof at a suppression hearing when evidence is challenged on constitutional grounds." Lego v. Twomey, 404 U.S. at 486, 92 S.Ct. at 625.

582 F.2d at 913, n.16.

undue prejudice . . .

Beechum, 582 F.2d at 911.

Appellant argues that the extrinsic offense evidence here is relevant only to his character. He argues that under United States v. Silva, 580 F.2d 144 (5th Cir. 1978), his defense was mistaken identity and his intent was not in issue.

Appellant misapprehends the nature of the defense of mistaken identity referred to in Silva. Silva relied on United States v. Adderly, 529 F.2d 1178, 1181 (5th Cir. 1976) in which we explained:

> A defendant who admits committing an act but relies on innocence, mistake or lack of knowledge to exculpate him has made an issue of intent. A defendant who denies participation in an act raises no discrete issue of intent and if the act be proven the intent will usually be inferred.

Appellant here does not deny participation in the acts proven in this case. He admits that he met Craft at the Seven-Eleven and that he circled the motel parking lot in search of Craft after Craft had been arrested. Instead, he claims these actions were of a wholly innocent nature, thereby putting his intent in issue.

The extrinsic offenses were relevant to the issue of appellant's intent. As we said in United States v. Hitsman, 604 F.2d 443,448 (5th Cir. 1979), "[e]vidence of prior drug dealings is highly probative

of intent to distribute a controlled substance. . . ."

Appellant also argues that the extrinsic offense evidence's prejudicial effect outweighed its probative value. His argument is based on two factors: (1) that the length of time since these offenses had occurred reduced their probity; and (2) that the sheer number of other offenses introduced enhanced their prejudicial effect.

The trial court has wide discretion in making this determination in the first instance, and we find no abuse of that discretion here. The probative value/prejudicial effect analysis is, to a certain extent, similar to the analysis of the relevance of the other offense evidence to issues other than character. In determining the probative value of the evidence, we determine its relevance to issues at trial, and whether other evidence could be used to prove those same issues. We then determine the prejudicial effect of the evidence, and balance that effect with the probative value.

Appellant here claimed that he met Craft in the Seven-Eleven parking lot in regard to a fence that Craft built for Pride. To rebut this claim, the government needed to establish the ongoing supplier nature of Pride's relationship with Craft. The government had no other method of establishing this relationship other than the prior offense testimony. In Trevino, with regard to an accused's claim that certain telephone calls did not refer to drug sales, we said:

> the prior offense evidence was crucial in establishing Trevino's intent. The government had a substantial need for the evidence in order to contradict the defense theory that the telephone calls were innocuous in nature ...

565 F.2d at 1319-20. This language applies with equal force here.

Appellant argues that the probative value of this evidence is decreased substantially by the length of time that had passed between the sales. While to a certain extent the probative value is reduced, we have approved evidence of prior offenses even two to three years apart. Hitsman, 604 F.2d at 448.

In regard to the prejudicial effect of this evidence, appellant points to United States v. Krezdorn, 639 F.2d 1327 (5th Cir. 1981). There, this court held the introduction of 32 forged documents, not charged in the case was error. The court held that since:

> the extrinsic evidence involves precisely the crime with which Krezdorn was charged, to allow the introduction of the extrinsic offense evidence would be to allow the jury to be overwhelmed by the sheer numerosity

639 F.2d at 1332.

Krezdorn is inapposite here. The court actually held that the prejudicial effect outweighed the probative value because the evidence was not relevant to any issue in the case. Here the testimony regarding prior offenses was of paramount importance to the government's case.[2]

Any prejudicial effect was reduced by the district court correctly instructing the jury not to consider the prior acts as evidence of guilt. The testimony also did not go into unnecessary details of these transactions. We therefore hold that the district court adequately balanced the competing factors in this case, and that the extrinsic offense evidence was admissible.

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[2] We note that the nature of the evidence in Krezdorn is different from the evidence here. In Krezdorn, the government produced 32 forgeries which were admitted into evidence. The jury could examine this documentary proof, and could well be overwhelmed by such proof. The oral testimony of one witness, whose credibility was substantially attacked, does not give rise to the same concerns.

B. Insufficient Evidence

Appellant claims that the district court erred in overruling his motion for acquittal at the close of the government's case. Pride relies on alleged inconsistencies between Craft's testimony and a DEA tape of certain of Craft's conversations.

Pride did not renew his motion for acquittal at the cloSe of his case. This failure to reurge constitutes a waiver of the objection to the denial of the motions. United States v. Elam, 678 F.2d 1234, 1248 (5th Cir. 1982). Thus, we may review the evidence only to prevent a "manifest miscarriage of justice" or plain error. United States v. Perez, 651 F.2d 268, 273 (5th Cir. 1981).

We do not encounter any such error here. Uncorroborated testimony by an accomplice is sufficient to sustain a conviction. United States v. Cooper, 606 F.2d 96, 98 (5th Cir. 1979), cert. denied, 444 U.S. 1024 (1980). The jury is the arbiter of witness credibility, and Craft's testimony was not "so unbelievable on its face that it defie[d] physical laws." United States v. Lerma, 657 F.2d 786, 789 (5th Cir. 1981), cert. denied, 455 U.S. 921 (1982).

Juror Misconduct

Pride alleges that the district court erred in not holding an evidentiary hearing regarding his motion for new trial. This motion was based upon allegations

of juror misconduct. Appellant submitted an affidavit stating that interviews with the jurors showed they had discussed the defendant's failure to testify and whether it was because of a prior criminal record. Pride asserts that under United States v. Howard, 506 F.2d 865 (5th Cir. 1975), the district court was required to hold a hearing and determine if the juror misconduct was prejudicial to defendant.

Appellant's reliance on Howard is misplaced. The court dealt with a juror who introduced facts within his personal knowledge regarding the defendant's prior brushes with the law. The court emphasized that its holding was in keeping with the rule forbidding:

> the eliciting of juror testimony regarding the jury's mental processes, or the influences that any particular evidence had upon the jury's conclusion.

Id. at 868. The court's concern was with the introduction of extrinsic evidence, untested by the rigors of cross-examination.

The affidavits show that the misconduct here did not concern extrinsic evidence or facts brought to the jury's attention improperly. Instead, the "misconduct" concerned inferences that the jury may draw. In Cunningham v. United States, 356 F.2d 454 (5th Cir.), cert. denied, 384 U.S. 952 (1966), we rejected a similar claim that the jury's discussion of the

defendant's failure to testify required reversal, stating that the trial court properly refusing to allow defense counsel to interview the jury because "the case fits within the well settled general rule that a juror will not be heard to impeach his own verdict." Id. at 455.

AFFIRMED.

The Fifth Amendment of the Constitution of the United States provides as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Rule 104(b) of the Federal Rules of Evidence provides as follows:

> "(b) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to

> support a finding of the fulfillment of the condition."

Rule 404(b) of the Federal Rules of Evidence provides as follows:

> "(b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

"Q. (By Mr. Williamson) Mr. Craft, over this two year period on what occasions and why -- what contact -- excuse me, Mr. Craft. Over this two year period on what occasion would you have contact with Mr. Pride?

A. Sometimes if I wanted to buy something.

Q. Like what?

A. Some drugs.

Q. What kind of drugs?

A. Cocaine.

Q. Was that for your own use or for resell?

A. Mostly personal use.

Q. How many times over this two year period would you contact him for drugs?

A. Several, I couldn't give you an approximate number.

Q. Did you actually obtain any drugs from him?

A. Yes, sir.

Q. Cocaine?

A. Yes, sir."

On cross-examination, Craft testified as follows:

"Q. Did you ever meet him at a 7-11 besides for this time that you've told the Government about?

A. Not that I can recollect.

Q. Where did you pick up the drugs?

A. Sometimes in the street, maybe a club parking lot.

Q. Can you give the court any approximation of the dates when these transactions occurred?

A. That would be tough. I mean, it's -- you know, I didn't keep a running track of it.

THE COURT: Well, about, about when? Can you tell us about when they might have occurred?

THE WITNESS: Last summer, summertime.

Q. (By Mr. Guthrie) How many occasions were there?

A. No exact number.

Q. All right, 10, 15?

A. Several, 20, 25, maybe more.

Q. 25 times. Can you tell us where you met the defendant for the first time, first time you ever bought

cocaine from him, allegedly?

A. I couldn't recollect.

Q. How about the second time?

A. I have no specific dates, you know, its --

Q. So it is your testimony, Mr. Craft, that you can't give the Court any indication of how many times you met him or even the location of any of these times you met him; is that right? That's your testimony, is it?

A. Yes, sir.

THE COURT: You can't say where you met him?

THE WITNESS: I remember where basically it was, random places, but it could be at a parking lot and Walnut Hill or it could be some other club; wasn't any specific place.

Q. (By Mr. Guthrie) Now, regarding the bets that you say he allegedly --

THE COURT: I'm not going to let in any of that.

MR. GUTHRIE: Okay, thank you.

Q. (By Mr. Guthrie) Were any other individuals present at any of these cocaine transactions that you're testifying about?

A. No, sir.

Q. Just you and the defendant?

A. Yes, sir."